Nos. 79-1538 and 80-231

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.,
Appellees.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,
Appellants,

v.

STATE OF INDIANA, ET AL.,
Appellees.

On Appeal from the United States District Courts for the Western District of Virginia and the Southern District of Indiana

BRIEF AMICI CURIAE IN SUPPORT OF APPELLANTS BY THE NATIONAL WILDLIFE FEDERATION, APPALACHIAN COALITION, COUNCIL OF THE SOUTHERN MOUNTAINS, INC, ILLINOIS SOUTH, SAVE OUR CUMBERLAND MOUNTAINS, AND THE TUG VALLEY RECOVERY CENTER, INC.

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QUESTIONS PRESENTED

1. Does Section 521(a)(2) of the Surface Mining Control and Reclamation Act of 1977 ("Act"), 30 U.S.C. § 1271(a)(2), providing for summary cessation of mining activity in two carefully defined hazardous situations, violate the Due Process Clause of the Fifth Amendment to the Constitution?

2. Does Section 518(c) of the Act, 30 U.S.C. § 1268(c), providing for the payment into interest-bearing escrow accounts of proposed civil penalty assessments, after an opportunity for an informal hearing, violate the Due Process Clause of the Fifth Amendment to the Constitution?

3. Do Section 510(d), concerning reclamation of prime farmland, Sections 515(d) and (e), concerning return of land to approximate original contour, and Section 522, concerning designation of certain lands as "unsuitable" for mining, violate the Taking Clause of the Fifth Amendment to the Constitution? *

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* A number of other important questions are presented on these appeals, which due to limited resources Amici will not brief. As to these other questions, however, Amici fully support the position of Appellants Cecil D. Andrus, *et al.* as set out in their briefs.

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INTEREST OF AMICI

Pursuant to Supreme Court Rule 36.2, the above listed organizations file this brief as Amici Curiae in support of Appellants. Counsel for all parties have consented to the filing of this brief.

The National Wildlife Federation (NWF) is the country's largest non-governmental conservation organization. It was incorporated under the laws of the District of Columbia in 1939 and is dedicated to the wise use and management of the country's natural resources. Members of the Federation's state affiliate organizations in each of the fifty states, Guam, Puerto Rico, and the Virgin Islands, combined with NWF's own individual associate members, total more than four million persons.

The Appalachian Coalition is a non-profit corporation incorporated in the State of Tennessee composed of citizen groups concerned with the issue of strip mining in six central and southern Appalachian states.

The Council of the Southern Mountains, Inc., is an Appalachian-based, community-oriented, non-profit organization. The Council has been deeply involved in the issues surrounding strip mining in central Appalachia for many years.

Save our Cumberland Mountains (SOCM) is a non-profit citizen's group, based in Tennessee, whose purpose is to improve the quality of life in the coalfields. SOCM draws its membership from and is governed by local residents.

The Tug Valley Recovery Center (TVRC) is a non-profit citizen group incorporated in the State of West Virginia. Its membership is composed primarily of low income citizens of the Tug Valley and Mingo and McDowell Counties of West Virginia.

Amici's members are directly affected by the impacts of surface mining. Amici share a deep concern for the protection of the human and natural environment from

abusive surface mining practices, as envisioned and mandated by Congress under the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445, 30 U.S.C. § 1201 *et seq.*

STATEMENT OF THE CASE

After many years of hearings, debates, and unsuccessful attempts at legislation, Congress passed and the President signed the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445, 30 U.S.C. § 1201 *et seq.* As passed, the Act represents a careful balance between the need for the protection of significant human and environmental values and the production of coal. *See, e.g.*, 30 U.S.C. § 1201; H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 57-60, 71-73 (1977); S. Rep. No. 95-128, 95th Cong., 1st Sess. 49-53 (1977).

As is true with numerous environmental statutes, the Surface Mining Act grew out of the failure of state governments to control adequately the surface mining of coal. As Representative Udall, Chairman of the House Committee on Interior and Insular Affairs, stated,

> The accumulation of environmental damage from mining is astounding . . . [and] the legislative efforts to control mining . . . can be characterized as "too little too late". . .

Hearings before House Subcommittee of the Committee on Interior and Insular Affairs, on H.R. 3 and Related Bills, 93rd Cong., 1st Sess. (1973), Part I, p. 745 [hereinafter *1973 Hearings*]. The Senate Committee on Energy and Natural Resources similarly concluded that "most existing State laws . . . for surface mining and reclamation are inadequate. . . ." S. Rep. 95-128, *supra*, at 51.[1]

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[1] A more detailed discussion of the economic and political causes behind the "disappointing State regulation" can be found in H.R. Rep. 93-1072, 93d Cong., 2d Sess. 61-63 (1974).

The States' failure to regulate coal mining forced the public to pay significant environmental and social costs. As the Senate Committee stated:

> Surface coal mining activities have imposed large social and environmental costs on the public at large in many areas of the country in the form of unreclaimed lands, water pollution, erosion, floods, slope failures, loss of fish and wildlife resources, and a decline in natural beauty. Uncontrolled surface coal mining in many regions has effected a stark, unjustifiable and intolerable degradation in the quality of life in coal communities.

Id. at 50.[2]

Certain coal states and the coal industry, which have bitterly opposed the strict regulation of mining activity, have challenged the constitutionality of key provisions of the federal legislation. Two such cases, in which significant provisions of the Act were struck down, are now before this Court.

SUMMARY OF ARGUMENT

1. *Section 521(a)(2) of the Act, providing for summary cessation of mining activity in certain circumstances, does not violate procedural due process.* Section 521(a)(2) provides for the Secretary of the Interior or his authorized representative to order the summary cessation of mining activity whenever either "imminent danger to the health and safety of the public" or "sig-

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[2] The Committee noted:

> Each week some 1,000 acres of land are disturbed by the surface mining of coal. As of January 1, 1972, . . . 1.7 million acres . . . were disturbed. . . . Only about half these lands have been reclaimed. . . .

Id. at 51.

Representative Udall noted that "In Appalachia alone, [thousands of] . . . miles of streams are continuously polluted by acid drainage and siltation from mining [both underground and surface]." 1973 Hearings, at 745.

nificant, imminent environmental harm" exists. 30 U.S.C. § 1271(a)(2). This Court repeatedly has upheld the right of the government to take summary action to protect interests of paramount public or governmental importance such as public health or safety. *Fuentes* v. *Shevin*, 407 U.S. 67, 91-93 (1972). All that is constitutionally required in such instances is an opportunity for a hearing "at some stage" of the process. *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950). The Surface Mining Act provides a prompt post-deprivation hearing. 30 U.S.C. § 1275(c), § 1271(a)(5), and §§ 1275(a) and (b).

2. *Section 518(c) of the Act, providing for payment into escrow of proposed civil penalty assessments, does not violate procedural due process.* Under the Act and the Secretary's implementing regulations, the mine operator is afforded two opportunities for informal hearing prior to payment of proposed penalties into escrow: first, an opportunity for a written submission; and second, an opportunity for an informal conference. 30 C.F.R. Parts 723 and 845. This provides greater procedural safeguards than are constitutionally required, given "the private and governmental interests at stake here and the nature of the existing procedures." *Mathews* v. *Eldridge*, 424 U.S. 319, 341 (1976).

3. *Sections 515(d) and 515(e) concerning return of mined land to approximate original contour, Section 510 (d) concerning reclamation of prime farmland, and Section 522 which designates certain land as "unsuitable" for mining, do not violate the "taking" clause of the Fifth Amendment.* The Court need not reach the taking issue raised by the Appellees below since the Appellees in the Virginia case failed to identify particular pieces of property that had been taken and the Appellees in the Indiana case never applied for permits to mine land. Also, in neither case did Appellees seek any administrative relief from the requirements they challenge.

This Court in determining whether a taking has occurred should weigh the various relevant private and public interests. *Agins* v. *City of Tiburon*, 100 S. Ct. 2138, 2141 (1980). The public benefits of the relevant sections of the Surface Mining Act clearly outweigh any burden on private parties.

Finally, both the Virginia and Indiana District Courts misapplied this Court's holding in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). That decision concerned the adjudication of private rights and not the exercise of the police power which is at issue in the Surface Mining Act.

ARGUMENT

I. SECTION 521(a)(2) OF THE ACT, PROVIDING FOR SUMMARY CESSATION OF MINING ACTIVITY IN TWO CAREFULLY DEFINED HAZARDOUS SITUATIONS, DOES NOT VIOLATE THE FIFTH AMENDMENT GUARANTEE OF PROCEDURAL DUE PROCESS

Section 521(a)(2) of the Act provides for the summary cessation of mining activity in two hazardous situations: (1) whenever an "imminent danger to the health and safety of the public" exists, or (2) whenever a condition or practice exists which is causing or can reasonably be expected to cause "significant imminent environmental harm". 30 U.S.C. § 1271(a)(2). These two statutory terms are carefully defined in the Act itself or in the Secretary's implementing regulations and meet the due process standards established by the precedent of this Court.[3]

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[3] In *Andrus* v. *Virginia Surface Mining and Reclamation Association, Inc., et al.*, No. 79-1538, the district court ruled that Section 521(a)(2) of the Act violates the procedural due process guarantees of the Fifth Amendment to the Constitution, because in the court's view, the statute does not provide sufficient guidance concerning those circumstances in which the issuance of summary cessation orders is appropriate. (VSMRA J.S., App. C, 19a, App. D, 57a-74a).

An "imminent danger to the health and safety of the public" is defined by statute to mean:

> [T]he existence of any condition or practice, or any violation of a permit or other requirement of this Act in a surface coal mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same conditions or practices giving rise to the peril, would not expose himself or herself to the danger during the time necessary for abatement.

30 U.S.C. § 1291(8).

A "significant, imminent environmental harm" is defined by the Secretary's implementing regulations as follows:

> (i) An environmental harm is any adverse impact on land, air, or water resources, including but not limited to plant and animal life.
>
> (ii) An environmental harm is imminent if a condition, practice or violation exists which (a) is causing such harm or (b) may reasonably be expected to cause such harm at any time before the end of the reasonable abatement time that would be set under section 521(a)(3) of the Act.
>
> (iii) An environmental harm is significant if that harm is appreciable and not immediately reparable.

30 C.F.R. § 700.5 and § 701.5.[4]

This Court has upheld the right of the government to take summary action to protect interests of paramount

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[4] A cessation order issued under these provisions remains in effect until the hazardous condition or practice is abated, or the order is modified, vacated, or terminated by the Secretary. 30 U.S.C. § 1271(a)(2). Lesser sanctions are issued where a violation exists but does not constitute an imminent hazard. *See* 30 U.S.C. § 1271(a)(3).

public or governmental importance in numerous instances. *Memphis Light, Gas and Water Division* v. *Craft*, 436 U.S. 1 (1978); *Fuentes* v. *Shevin*, 407 U.S. 67, 91-93 (1972); *Boddie* v. *Connecticut*, 401 U.S. 371, 279 (1971); *Sniadach* v. *Family Finance Corporation of Bay View*, 395 U.S. 337, 339 (1969).

Protection of the health and safety of the public constitutes a paramount governmental interest which justifies summary action. Indeed, deprivation of property without prior notice or hearing for the protection of the public health and safety is "one of the oldest examples" of permissible summary action. *Ewing* v. *Mytinger & Casselberry, Inc.*, 399 U.S. 594, 599-600 (1950).[5]

In *Ewing* v. *Mytinger & Casselberry, Inc., supra*, the Court upheld the multiple seizure of several lots of a food supplement without a prior hearing, not because the product was dangerous, but because it was labeled in a misleading fashion. In so doing, the Court said:

> It is said that these multiple seizure decisions of the Administrator can cause irreparable damage to a business. And so they can . . . Discretion of any official may be abused. *Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.* One of the oldest examples is the summary destruction of property without prior notice or hearing for the protection of public health. There is no constitutional reason why Congress in the interests of consumer protection may not extend that area of control [to articles sold in a misleading manner]. . . A requirement for a hearing, as a matter of constitutional right, does not arise merely because the danger of injury may be more apparent or immediate in the one case than in the other. . .

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[5] *See also, Mackey* v. *Montrym*, 443 U.S. 1 (1979); *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908).

That is a decision for Congress, not for us. [Emphasis added] [citations omitted].

339 U.S. at 599-600.

In providing summary administrative powers to deal with hazardous situations, therefore, the Surface Mining Act is fully consistent with the well established case law of this Court.[6]

In upholding summary actions of the government to protect the public health and safety against due process challenges, this Court has stated that it is not a requirement of the process that there be judicial inquiry before discretion is exercised if there is "at some stage" an opportunity for a hearing. *Ewing* v. *Mytinger and Casselberry, Inc., supra,* 339 U.S. at 599-600. In the instant situation, mine operators are afforded a prompt and adequate post-deprivation hearing. In fact, they have an opportunity for several post-deprivation hearings. First, following the issuance of a cessation order, the operator may petition the Secretary for temporary relief pending a final determination of the legality of the cessation order. On such a petition, the operator is entitled to a hearing and an interim decision within no more than five days.[7] 30 U.S.C. § 1275(c). Second, following the issuance of a cessation order, the operator may request informal mine site review, and if no such informal hearing is held within 30 days, the order automatically expires. 30 U.S.C. § 1271(a)(5); 30 C.F.R. § 722.15 and § 843.15. Third, whether or not the op-

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[6] The U.S. District Court for the District of Columbia in *In Re Surface Mining Regulation Litigation,* 456 F.Supp. 1301 (D.D.C. 1978), expressly upheld the constitutionality of § 521(a)(2) in the face of a due process challenge. *See also, Star Coal Co.* v. *Andrus,* Civ. No. 79-171-2 (S.D. Iowa, February 13, 1980), Slip Op. 17-18.

[7] Interim relief may be granted, after an informal public hearing, if the applicant demonstrates a substantial likelihood of success on the merits and the relief sought will not adversely affect public health or safety or cause significant, imminent environmental harm. 30 U.S.C. § 1275(c).

erator seeks temporary relief or mine site review of the cessation order, he may apply for a full formal review of the cessation order under § 525(a) of the Act, which provides an adjudicatory hearing conducted according to the Administrative Procedure Act, 5 U.S.C. § 554. 30 U.S.C. § 1275(a). If an operator requests such a hearing, the Secretary must hold the hearing and issue a decision within 30 days after the filing of the application. 30 U.S.C. § 1275(b).

The lower court apparently did not take issue with any of the above principles. Rather, the District Court based its decision on the unconstitutionality of the cessation order on the grounds that the standards under which the § 521(a)(2) cessation orders may be issued are too vague, subjective, and broad.[8] This is patently incorrect. The imminent hazards covered by the summary cessation authority of § 521(a)(2) are carefully defined by the statute and the Secretary's implementing regulations.[9]

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[8] The district court also ruled that, once Congress has provided the more objective guidelines the court deemed necessary, the statute would remain constitutionally deficient because it provides under Section 525(c) for an interim relief determination by the Secretary within five days rather than the twenty-four hour period preferred by the court. 30 U.S.C. § 1275(c). (VSMRA J.S., App. D, 73a). The five day period, however, is a statutory maximum. There is no indication in the record that the Secretary has not c will not act in less than five days. In any event, the five day period is eminently reasonable.

[9] Congress gave considerable thought to the issuance of cessation orders and set certain parameters for their use. On the one hand, Congress determined that the type of damage inherent in properly run operations should not normally provoke cessation orders. S. Rep. 94-28, 94th Cong., 1st Sess. 181 (1975).

On the other hand, Congress recognized that in certain circumstances, depending on local geological, hydrological, or other conditions, even efforts at full compliance with the Act's performance standards cannot prevent severe environmental harm. Therefore, it specified that the standards for significant environmental harm should remain flexible and that

> the closure authority of section . . . [521(a)(2) must not be restricted] to violations of the Act or permit. Instead, any

These definitions are sufficiently specific to control governmental action, to reduce the risk of erroneous deprivation, and in fact are quite similar to standards already upheld by this Court. *See e.g., Ewing* v. *Mytinger & Casselberry, Inc., supra,* 399 U.S. at 595 ("dangerous to health . . . or would be in material respect misleading to the injury or damage of the purchaser or consumer"); *Fahey* v. *Mallonee,* 332 U.S. 245, 250-251 n. 1 (1947) ("is unsafe or unfit to manage a federal savings and loan association" or "[i]s in imminent danger of becoming impaired"); *Air East, Inc.* v. *National Transportation Safety Board, supra,* 512 F.2d at 1232 ("emergency requiring immediate action . . . in respect to air safety in commerce").[10]

The lower court was wrong in holding unconstitutional the summary cessation authority of § 521(a)(2) of the Surface Mining Act, where imminent hazards to the public and the environment are at stake.[11] That pro-

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condition or practice giving rise to imminent danger or environmental harm is sufficient to invoke the authority.

S. Rep. 95-128, *supra,* at 91. *See also,* H.R. Rep. 95-218, *supra,* at 130.

Given this need for flexibility, Congress stressed the need for giving primary enforcement authority to field inspectors who "are in the best position to recognize and control compliance problems". S. Rep. 95-128, *supra,* at 90.

[10] In *Sink* v. *Morton,* 529 F.2d 601 (4th Cir. 1975), the Fourth Circuit upheld the constitutionality of the summary enforcement power in Section 104(c) of the Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 814(c), which was amended by the Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290. *See* 30 U.S.C. § 801 *et seq.* (Supp. I) Section 104(c) was redesignated section 104(d) but was not changed in any material respect.

[11] The lower court's Order dated January 21, 1980, (VSMRA J.S. App. A) clarifying its original Order dated January 3, 1980, (VSMRA J.S., App. C) limits the scope of the Court's ruling to § 521(a)(2) cessation orders and does not strike down § 521(a)(3) cessation orders issued for failure to abate a violation as required by a prior notice of violation. 30 U.S.C. § 1271(a)(3). Thus it is

vision fully comports with the procedural due process requirements of the Fifth Amendment to the Constitution, and this Court should reverse the decision below.

II. SECTION 518(c) OF THE ACT, PROVIDING FOR THE PAYMENT INTO INTEREST-BEARING ESCROW ACCOUNTS OF PROPOSED CIVIL PENALTY ASSESSMENTS, AFTER AN OPPORTUNITY FOR AN INFORMAL HEARING, DOES NOT VIOLATE THE FIFTH AMENDMENT GUARANTEE OF PROCEDURAL DUE PROCESS

Section 518(c) and the Secretary's implementing regulations require that a mine operator who is formally assessed a civil penalty pay the proposed penalty into an escrow account, pending a formal adjudicatory hearing and final assessment determination. 30 U.S.C. § 1268 (c) ; 30 C.F.R. § 723.18 and § 845.19.[12]

Under existing due process standards, the escrow payment provision would afford adequate procedural due process even without any provision for a pre-deprivation hearing.[13] This Court, however, need not reach that is-

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not among the "questions presented" as set forth by the Court in noting probable jurisdiction.

[12] The district courts in *Andrus* v. *VSMRA*, *supra* and *Andrus* v. *Indiana*, No. 80-231, ruled that the escrow provision of Section 518 (c) violates the procedural due process requirements of the Fifth Amendment to the Constitution. In the former case, the court apparently misunderstood the civil penalty scheme as providing for a final assessment prior to an opportunity for a hearing, whereas the Act clearly provides that assessments made prior to a hearing are merely "proposed" assessments. 30 U.S.C. § 1268(c) (VSMRA J.S., App. A, 2a-3a, App. C, 19a, and App. D, 67a-69a, 74a). In both cases, the courts ignored the opportunity for a hearing prior to the payment into escrow of proposed civil penalties. (*Id.*; Indiana J.S., App. A, 42a-44a).

[13] As Mr. Justice White wrote in *Arnett* v. *Kennedy*, 416 U.S. 134, 187 (1974) (concurring and dissenting opinion) "[i]n passing upon claims to a hearing before preliminary but nonfinal deprivations, the usual rule of this Court has been that a full hearing at some time suffices."

sue, since the regulatory scheme provides an opportunity for a pre-deprivation hearing which fully satisfies even the most stringent procedural due process requirements. Indeed, it affords greater procedural safeguards than are constitutionally required, given "the private and governmental interests at stake here and the nature of the existing procedures." *Mathews* v. *Eldridge*, 424 U.S. 319, 340 (1976).

To determine the measure of due process afforded coal operators in civil penalty assessments, it is necessary to understand the civil penalty assessment system for violations of the Act and regulations.[14] Upon observation of a violation, a federal mine inspector issues to the coal operator a notice of violation or cessation order. Upon receipt of the sanction, and prior to the determination of a proposed civil penalty by a federal assessor, an operator may submit in writing any information, argument, or evidence relevant to the fact of violation or a prospective penalty. Under the regulations the Secretary must consider the submission in proposing any civil penalty. 30 C.F.R. § 723.16(a) and § 845.17(a).

In *Mathews* v. *Eldridge*, *supra*, this Court held that the opportunity for a written submission, prior to tem-

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[14] The finding of violation is made by a highly trained field inspector who has visited the minesite and observed first-hand the conditions and practices there. 30 U.S.C. §§ 1271(a)(2) and (3). While the inspector must apply the law to the factual circumstances he observes, mining conditions and practices are regulated by extremely detailed statutory and regulatory provisions, removing uncertainty in the vast majority of fact situations. 30 C.F.R. Parts 715, 716 and 717.

Once enforcement action is taken the matter is referred to an assessment specialist in Washington, D.C., to determine the appropriate civil penalty, if any. Under § 518(a) of the Act, the assessment of civil penalties is discretionary with respect to notices of violation and mandatory with respect to cessation orders. 30 U.S.C. § 1268(a). The Secretary's implementing regulations establish with particularity those instances in which assessments will be made for notices of violation. 30 C.F.R. Parts 723 and 845.

porary deprivation of a property interest, satisfied due process requirements. 424 U.S. at 344-348. The private interest at stake was the termination of an individual's social security disability benefits (424 U.S. at 340-344) and the only governmental interest was the conservation of fiscal and administrative resources. 424 U.S. at 347-348. Even in this context, this Court found that written submisions by benefit recipients were constitutionally sufficient to address factual issues concerning the individual's medical condition and ability to engage in substantial and available gainful work. Written submissions by mine operators, therefore, are clearly sufficient to address the narrow factual and legal issues concerning specific minesite conditions or practices observed by a federal inspector.

In the instant situation, moreover, the Secretary has provided not only for submission of written information before the escrow payment but also for an informal hearing before the escrow payment. Under the regulations, if the Secretary proposes a civil penalty assessment,[15] the operator may request an informal hearing, before an official other than the inspector or assessor, to review the assessment, and the Secretary must consider all relevant information submitted by the operator. 30 C.F.R.

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[15] Once a determination is made to assess a civil penalty, the amount is determined by reference to four statutory criteria: (1) the mine's history of previous violations; (2) the seriousness of the violation; (3) whether the operator was negligent; and (4) the operator's good faith efforts to achieve rapid compliance once cited. 30 U.S.C. § 1268(a). To insure the uniform application of these criteria to the greatest extent possible, the Secretary has adopted a point system, under which a range of points is assigned to each criterion. The assignment of points, for the most part, is geared to objective criteria. The total number of points assigned for the four criteria give rise to a specific dollar figure. *See* 30 C.F.R. Parts 723 and 845.

This system minimizes, to the greatest extent possible, the risk of error in proposing civil penalty assessments.

§§ 723.17 and 845.18.[16] Only if the informal hearing results in no agreement must the operator, if he chooses to contest the assessment, place the amount of the proposed civil penalty into an escrow account pending formal review.

In *Memphis Light, Gas and Water Division* v. *Craft*, 443 U.S. 1 (1978), this Court required only an informal consultation prior to termination of municipal utility service, which the Court stated was a necessity of modern life and whose discontinuance might threaten health and safety. Under § 518(c), provision for such an informal hearing is made, despite the fact that the operators' interest does not approach the public health and safety in importance.

Under the § 518(c) escrow provision, therefore, the operator and the Secretary are well along in the civil penalty process before any escrow payment is required. The operator has had an opportunity for both a written and an oral presentation of his arguments and evidence before the escrow payment is required. The escrow payment is required only to continue a challenge to the assessment through a formal adjudicatory hearing. Once the escrow requirement is met, the operator receives a full adjudicatory hearing, subject to 5 U.S.C. § 554, conducted by an administrative law judge and with an appeal to an administrative board. 30 U.S.C. § 1268(b).[17]

The issue presented by this case, therefore, is whether a full *evidentiary* hearing is required prior to a temporary deprivation of the operator's property interest. As

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[16] Such a provision for holding informal conferences, after proposed assessments are issued and before any escrow payment is required, is fully consistent with the statute to the extent that the conferences are held and the subsequent assessment, if any, is paid or forwarded for escrow within 30 days of issuance of the proposed civil penalty. *See* 30 U.S.C. § 1268(c).

[17] The Secretary's final assessment determination is subject to judicial review. 30 U.S.C. § 1276(a)(2).

stated by the Court in *Mathews* v. *Eldridge, supra*, "[t]he ordinary principle, established by our decisions, [is] that something less than an evidentiary hearing is sufficient prior to adverse administrative action." 424 U.S. at 344. Indeed, this Court has required an evidentiary hearing prior to temporary deprivation by government authorities in only one case, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).[18] This was required because the property interest involved was the termination of welfare payments, which were necessary for personal subsistence pending a final eligibility determination. *Mathews* v. *Eldridge, supra*, 424 U.S. at 340-341. At the same time, the sole governmental interest was in conserving fiscal and administrative resources. *Goldberg* v. *Kelly, supra*, 397 U.S. at 266-267.[19]

The private and governmental interests involved in the escrow payment provision stand in sharp contrast to those in the *Goldberg* v. *Kelly* case. The private interest is far less significant, and the governmental interest far greater in the instant situation. The private interest of the mine operator is nothing more than the forfeiture of the opportunity to use the funds placed in escrow for the duration of formal administrative review proceedings.[20] It involves only the temporary deprivation of a

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[18] *Mathews* v. *Eldridge, supra*, 424 U.S. at 340.

[19] The Court in *Goldberg* v. *Kelly, supra*, determined that, in the welfare termination context, anything less than an evidentiary hearing was inadequate. In that context, the "credibility and veracity" of witnesses was at issue covering circumstances presumably *not* observed firsthand by the agency or from which further factual inferences were drawn by the agency. *Id.* at 256 n.2, 268-269. The sole respect in which the prior hearing procedures in the instant case differ from the prior hearing procedures required in the *Goldberg* v. *Kelly* case, therefore, is in the right to confront any adverse witnesses. *Id.* at 268.

[20] The inability of an operator to pay proposed civil penalties into escrow poses a separate and limited problem, due to the waiver of legal rights to challenge proposed assessments upon failure to meet the escrow requirement. 30 U.S.C. § 1268(c). It would be a

relatively small sum of money for a relatively short period of time.[21] If the operator succeeds in vacating or reducing the civil penalty assessment, funds are returned within thirty days with interest at a rate of 6% or the prevailing Treasury Department rate, whichever is greater. 30 U.S.C. § 1268(c). The operator's property interest, therefore, is only the possible loss resulting from his inability to use the funds to earn a return greater than the prevailing interest rate.

The governmental and public interest in the escrow requirement, on the other hand, weighs heavily in favor of its constitutionality. The procedure in Section 518(c) of the Act for payment of proposed penalties into escrow promotes the expeditious review of penalty assessments by removing the incentive for delay, and guarantees the prompt collection of penalties owing the government upon a final penalty determination. The streamlined procedure is necessary to insure that the civil penalty is an effective enforcement tool and deterrent to unlawful and socially harmful conduct.

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reasonable exercise of the Secretary's authority, however, in implementing § 518(c) to waive the escrow requirement upon a clear showing of financial inability to pay. Under well-established principles of statutory construction, neither the Secretary nor the courts should construe a statutory provision in such a fashion as to render it unconstitutional when it may be construed in another fashion consistent with constitutional requirements.

[21] The amount of funds placed in escrow typically is not large. In 1979 the average civil penalty was $1,471.70. *Mine Regulation & Productivity Report.* Vol. 4, No. 19, McGraw-Hill, Inc. (May 16, 1980), p. 3. Civil penalties, moreover, were assessed in 1979 at a rate of one penalty for every two surface mining and reclamation operations nationwide. *See, Council of the Southern Mountains, Inc., et al.* v. *Andrus,* C.A. No. 79-1521 (D.D.C. 1980), Defendant's Response to Plaintiffs' First Request for Admissions, ¶ 16 (filed February 25, 1980) (The Secretary's best estimate of the number of surface mining and reclamation operations nationwide, as of October 9, 1979, was 14,315 units.). The average assessment, therefore, is a negligible amount of money for most coal operators.

Congress placed the escrow provision in the Act to achieve precisely those purposes. The Act's basic civil penalty program is modeled on that of the Coal Mine Health and Safety Act of 1969. 30 U.S.C. § 801 *et seq.* S. Rep. No. 95-218, *supra*, at 58. Congress added the escrow payment provision, however, to deal with the problems it had encountered under the 1969 Mine Safety Act civil penalty program, specifically the tremendous delay and often outright failure in the collection of penalties. *Id.* at 58-59.[22]

Consideration of the operator's business interest in a potential and, in any event, insubstantial loss of the use of a small amount of money for a limited period, the governmental and public interest in an effective deterrent of unlawful and hazardous strip mining conduct, the low risk of erroneous civil penalty assessments, and the procedural safeguards provided the coal operator, compels the conclusion that the escrow requirement of § 518(c) of the Act fully comports with the procedural due process requirements of the Fifth Amendment to the Constitution. *See, Mathews* v. *Eldridge*, *supra*, 424 U.S. at 336.

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[22] Under the 1969 Mine Safety Act, operators found it to their advantage to challenge civil penalty assessments in great numbers and to delay final determinations as long as possible. The administrative burdens involved in the litigation of myriad civil penalty cases were overwhelming. In many instances, the government settled cases en masse for vastly lower fines simply to reduce the backlog. Where payment was rendered in full, it was long after the penalty had been proposed initially. Many operators, however, did not pay final assessments, leaving it up to the Attorney General to bring thousands of collection cases in the backlogged federal district courts in the coalfields, resulting in even greater delays in the collection of civil penalties. Congress determined that the long delays between the finding of a violation and the collection of a civil penalty seriously diminished the effectiveness of the civil penalty as an enforcement sanction designed to deter violations of law, and that the harm to societal interests of failing to deter such violations was significant. *See*, S. Rep. No. 95-181, 95th Cong., 1st Sess. 15-17, 40-46 (1977); S. Rep. No. 94-198, 94th Cong., 2d Sess. 23-24, 28-32 (1976).

III. SECTION 510(d), CONCERNING RECLAMATION OF PRIME FARMLAND, SECTIONS 515(d) AND (e), CONCERNING RETURN OF LAND TO APPROXIMATE ORIGINAL CONTOUR, AND SECTION 522, CONCERNING DESIGNATION OF CERTAIN LAND AS "UNSUITABLE" FOR MINING, DO NOT VIOLATE THE "TAKING CLAUSE" OF THE FIFTH AMENDMENT

Both the District Court in the Western District of Virginia and the District Court for the Southern District of Indiana declared central provisions of the Act invalid as unconstitutional "takings" without compensation. In Virginia the court invalidated §§ 515 (d) and (e), which require that mined land, including steep slope areas, be returned to its pre-mining approximate original contour ("AOC"), except in instances where certain variances are granted. 30 U.S.C. §§ 1265 (d) and (e). The court declared that the requirement to return to AOC constituted an economic and physical restriction on the taking of coal. (VSMRA J.S., App. D, 43a-57a).

The Indiana court declared unconstitutional that part of the Act which permits mining to proceed in areas of prime farmland only if it can be demonstrated that, once reclaimed, the land will be equal in productivity to its pre-mining condition. 30 U.S.C. § 1260(d). The Court found that under currently known technology, surface mined land could not be returned to previous levels of productivity (under "high levels of management"), which meant that the Act would operate as a physical restriction on surface mining on prime farmland. (Indiana J.S., App. A, 39a-47a).

Both courts also declared unconstitutional § 522 of the Act, which designates certain land as "unsuitable" for mining, and establishes an administrative procedure whereby other areas may be so designated. (VSMRA J.S., App. D, 56a-57a; Indiana J.S., App. A, 39a-42a).

The decisions of these two courts strike at the very heart of the Surface Mining Act and make the achieve-

ment of its public purpose impossible. Having determined that some areas affected by surface mining can be successfully reclaimed, whereas others cannot, Congress determined that "surface mining operations [should] not [be] conducted where reclamation as required by this Act is not feasible." 30 U.S.C. § 1202(c). No permit to mine may be issued unless the operator demonstrates its ability to reclaim the land as required by the Act. 30 U.S.C. § 1260(b)(2). In other words, Congress determined that coal production was to be directed into areas where reclamation was possible and discouraged or prohibited in areas where it was not. The decisions of the two district courts below would turn this Congressional purpose on its head by rendering the government powerless to halt mining in exactly those most sensitive environments Congress meant to protect. A decision by this Court to affirm the decisions below would destroy the Surface Mining Act of 1977.[23]

A. Neither the Virginia nor the Indiana Case Is Ripe for Adjudication

This Court need not reach the "taking" questions. It is well established that courts may not adjudge the constitutionality of statutes except in the context of actual, concrete controversies. *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 460-462 (1945). Neither the Virginia nor the Indiana case presents an actual, concrete controversy.[24]

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[23] The lower courts held only those sections related to steep slopes and prime farmland, plus the § 522 designation procedures, invalid under the Fifth Amendment. But there are numerous other provisions of the Act, which if not met, would prevent mining. *See, e.g.*, 30 U.S.C. § 1260(b) (the general requirements for a permit). These other provisions are at risk here, as well.

[24] Assuming that the two cases are ripe for review, the failure of the Appellees to actually apply for permits to mine coal limits this Court's inquiry to the question of whether the Act is valid on its face. In its last term, this Court considered a case in which property owners challenged certain municipal zoning ordinances as

In the Virginia case, the Appellees failed to identify any particular piece of property that had been taken by the relevant sections of the Surface Mining Act. No evidence was presented in that case to indicate that particular tracts of land would diminish in value as the result of the operation of the Surface Mining Act.

In the Indiana case, the Appellees did identify particular tracts of land that might be affected by the Surface Mining Act. They failed, however, to show that they had ever actually applied for and been denied permits to mine those tracts.

In neither case did the Appellees show that they had sought any administrative relief from the requirements of Section 515(d) or Section 522. These sections contain extensive variance and waiver provisions as well as administrative and judicial review procedures. *See* 30 U.S.C. §§ 1265 (c) and (e); 30 U.S.C. § 1272(e); 30 U.S.C. § 1275; and 30 U.S.C. § 1276.

B. Appellees Have not Established a "Taking" of Their Property

Assuming that there exists an actual, concrete controversy in this case, Appellees nonetheless have failed to demonstrate that there has been a taking of their property.

This Court's modern analysis of the taking issue stems from Justice Holmes opinion in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922), where the Court noted that:

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a violation of the taking clause. The Court concluded that since the property owners had never actually sought approval for development of their land "* * * the only question properly before us is whether the mere enactment of the zoning ordinances constitutes a taking." *Agins* v. *City of Tiburon*, 100 S.Ct. 2138, 2141 (1980). Here, Appellees' contention is that the Act's application and not its mere enactment constitutes a taking. As such, Appellees' action must be dismissed.

> The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . ."

The Court has had considerable difficulty fashioning general principles for ascertaining when regulation "goes too far." *Penn Central Transportation Company* v. *City of New York*, 438 U.S. 104, 123-124 (1978). In determining whether a regulation "goes too far," this Court normally balances the private and public interests involved.[25] As explained in *Agins* v. *City of Tiburon*, *supra*, 100 S.Ct. at 2141:

> Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests. [citation omitted]

In the instant case, the public interest in prime farmlands, in the restoration of mined land to its approximate original contour, and in the designation of certain lands as "unsuitable" for mining outweighs the burden those requirements impose on private property owners.

1. *The Virginia Case: the Approximate Original Contour Provisions of the Act Are Constitutional*

The environmental benefits of requiring coal mine operators to return the land to its approximate original contour are significant. As the House of Representatives' Committee Report on the Surface Mining bill noted:

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[25] In certain past cases this Court has employed various tests which are plainly not applicable to the instant situation. This is clearly not a case involving "actual physical invasion" of property. Compare *United States* v. *Causby*, 328 U.S. 256 (1946); *Kaiser Aetna* v. *United States*, 100 S.Ct. 383, 393 (1979). Nor is it a case where all attributes of property ownership have been "extinguished." *Cf. Pruneyard Shopping Center* v. *Robins*, 100 S.Ct. 2035 (1980). Moreover, as discussed below, inasmuch as this is a case involving the broad exercise of the police power, the "diminution in value" is inapplicable here. Compare *Pennsylvania Coal* v. *Mahon*, 260 U.S. 393 (1922).

> In the humid East, retention of overburden material on the bench, avoiding all unnecessary placement of unconsolidated material on steep slopes, would contribute most significantly to the elimination of slides, sedimentation, siltation and other offsite effects which threaten downstream areas. *The basic concept embodying this principle is returning the mining site to its approximate original contour.* [Emphasis added]

H.R. Rep. No. 95-218, *supra*, at 80.

The primary rationale underlying the Virginia court's finding that the approximate original contour requirements of the Act are unconstitutional is its conclusion that a return to approximate original contour is "economically and physically impossible." (Virginia J.S. App. D., pp. 37a-38a, 44a).

This conclusion was expressly rejected by Congress after years of study and debate. H.R. Rep. No. 95-218, *supra*, at 97, 123-124; S. Rep. No. 93-402, 93rd Cong., 1st Sess. 44-45 (1973). Indeed, Congress anticipated the very arguments raised by the Appellees in the Virginia case:

> The bill's critics have alleged, to the contrary, that the term "approximate original contour" imposes an overly rigid and impractical requirement. It should be emphasized, therefore, that a reasonable interpretation of H.R. 2 cannot justify the assertion that the bill requires either the impossible task of restoration of the original contour or the useless act of digging a new pit to obtain fill material to achieve full restoration of the original topography.

H.R. Rep. 95-218, *supra*, at 96. The congressional findings that return to approximate original contour is necessary and feasible are entitled to considerable deference. As this Court repeatedly has observed:

> . . . legislative acts adjusting the burdens and benefits of economic life come to the court with a presumption of constitutionality. . . .

Usery v. *Turner Elkhorn Mining Company*, 428 U.S. 1, 15 (1976).

The evidence before the Virginia District Court concerning the reasonableness of returning land to its approximate original contour was mixed. (*Compare* Tr. 977-978, 1158, 1168-1169, 1171, 1217, 1788-1789, 1807-1808, *with* Tr. 2625, 2665, 628-629, 657-658). In the face of Congress' explicit review of the approximate original contour requirement, and with the trial evidence lying on both sides of the question, the district court should have deferred to the Congressional findings and conclusions. "[D]ebatable questions as to reasonableness are not for the courts, but for the Legislature. . . ." *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 595 (1962).

2. *The Indiana Case: The Prime Farmland Provisions Of the Act are Constitutional*

Prime farmland is one of the nation's most important resources,[26] yet it is disappearing at a dramatic rate. As the President's Council on Environmental Quality noted in its 1979 annual report:

> Prime farmlands are the most efficient, energy-conserving, environmentally stable lands available for meeting food and fiber production needs. Neverthe-

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[26] Senator Culver, in introducing the prime farmland protection provisions of the Act, called such land the nation's most valuable resource, next to its people. 123 Cong. Rec. S8104 (daily ed. May 20, 1977).

The Indiana Court concluded in its 10th Amendment analysis that Congress' concern for the protection of prime farmland was unreasonable since the United States possesses large acreages of such land, and only small areas are affected by mining. (Indiana J.S. App. A., 21a-23a). Congress obviously concluded, just to the contrary, that the nation possessed such extensive coal reserves that it could afford to limit mining on fragile land areas such as prime farmland. Surely the elected legislatures are better equipped than courts to make the often unavoidable "choice between the preservation of one class of property and that of another . . ." *Miller* v. *Schoene*, 276 U.S. 272, 279 (1928).

> less, development pressures are converting prime lands to nonagricultural uses nationally at a rate of about 1 million acres per year.

Council on Environmental Quality, *Environmental Quality —1979*, 396 (1979). Congress attempted to deal with part of the prime farmland problem in the Surface Mining Act by allowing mining to proceed in areas of prime farmland only if it could be demonstrated that, once reclaimed, the land would be equal in productivity to its premining condition. 30 U.S.C. § 1260(d). *See* H.R. Rep. No. 95-218, *supra* at 105-106.

The Indiana District Court concluded that "it is technologically impossible to reclaim prime farmland in a postmining period so that equal or higher levels of yield under high levels of management practice can be achieved." (Indiana J.S., App. A, 41a). This finding, however, is directly contradicted by considerable evidence in the record (Defendants' Ex. A, B, F, G; Tr. 85-86, 142). In light of this conflicting evidence, it was entirely inappropriate for the Indiana District Court to have overturned Congress' explicit finding that reclamation of prime farmland is technologically possible.

3. *Section 522 of the Act is Constitutional*

Both the Virginia and Indiana courts declared § 522 of the Act, 30 U.S.C. § 1272, unconstitutional as a taking wtihout compensation.[27] Those rulings have no basis whatsoever in the record and must be reversed.

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[27] Both the Virginia and Indiana Court declared § 522(e), 30 USC § 1272(e), unconstitutional. (VSMRA J.S., App. D, 56a-57a; Indiana J.S., App. A, 39a-42a) It prohibits surface mining within 100 feet of a public road or cemetery, or within 300 feet of any occupied dwelling, public building, school, church or public park. It also limits mining on certain federal lands, such as parks and wilderness areas. The court in Virginia also declared unconstitutional § 522(a), 30 USC § 1272(a), which requires that states, to gain federal approval of a surface mining program, must establish a procedure whereby areas not Congressionally designated as un-

Neither court had before it evidence from any party who had been injured in any way by the operation of § 522(e) requiring mining operations to stay a certain distance from homes, cemeteries, and public establishments. Nor was there evidence that an administrative proceeding had designated any of Appellee's land unsuitable for mining pursuant to § 522(a).

Moreover, the sort of "setback" restrictions imposed by § 522(e) were many years ago upheld as constitutional by this Court. *See Gorieb* v. *Fox*, 274 U.S. 603 (1927). Even under the lower court's interpretation of the "diminution in value" test, such restrictions do not constitute a taking since "[t]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central Transportation Co.* v. *New York*, *supra*, 438 U.S. at 130.

Since § 522 is constitutional on its face, the lower courts' decisions invalidating it must be reversed. *Agins* v. *Tiburon*, *supra*, 100 S.Ct. at 2141.

C. The Diminution in Value Test is Inappropriate in Cases Where, As Here, Congress is Seeking to Employ Its Police Power to Implement a Broad Public Policy

Both the Virginia and Indiana Courts based their taking findings in part upon their conclusion that the relevant sections of the Surface Mining Act would diminish the value of Appellees' property interest. However, the diminution in value test was never intended to be applied to Congressional efforts to protect the public health and safety.[28] The lower courts' decisions to the

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suitable may be administratively designated if it is shown that they cannot be reclaimed or that they possess especially significant surface land values. (VSMRA J.S., App. D, 56a-57a).

[28] Any attempt to base the law of taking on an economic test is doomed to produce very peculiar practical consequences. Since a

contrary are based on an erroneous reading of Justice Holmes' decision in *Pennsylvania Coal Co.* v. *Mahon, supra,* the case in which this Court first set down its "diminution in value" test. A careful reading of the *Pennsylvania Coal* case shows that the "diminution in value" test was intended to be applied only to governmental attempts to alter private interests and not to the exercise of the police power to protect the public health and safety.

The *Pennsylvania Coal* case involved the constitutionality of Pennsylvania's Kohler Act. The Act prohibited mining activities that would cause subsidence of any private dwelling used as a human habitation. 260 U.S. at 412-413.

The Mahons in that case owned the surface of certain land on which they had built a house. That land sat above coal interests owned by the Pennsylvania Coal Company. The Mahons had obtained title to the property several decades earlier as a result of a conveyance by the coal company in which the surface estate was severed from the mineral estate. The right to remove all coal under the tract was reserved to the Pennsylvania Coal Company, and the Mahons took the premises subject to the express waiver of all claims for damages that might arise from the mining of the coal including subsidence. Relying on the Kohler Act, the Mahons sought to enjoin mining to the extent that it might cause subsidence of their home. *Id.* at 412.

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determination of whether it is economic to mine a certain seam of coal depends in part on the price of coal, the constitutionality of regulatory requirements would fluctuate with the price of coal. A coal seam that was marginally economic to mine one month might be uneconomic to mine the next if the price of coal dropped. If the taking law were based on the economic feasibility of mining, Surface Mining regulations as they applied to that mine would be constitutional one month and unconstitutional the next. Indeed, testimony in the Virginia case indicates that coal prices fell nearly 30 percent during the first few months of the Surface Mining Act's implementation. Testimony of Richard Newcombe, Tr. at 1238.

A review of the arguments made by the Pennsylvania Coal Company in the Supreme Court clearly indicates that the heart of its argument was that the Kohler Act was an attempt to rewrite the contractual agreement between the company and the Mahons, and not an attempt to protect the public health and safety. As the Company noted in its brief to this Court:

> The Act shows on its face that its purpose is not to protect the lives or safety of the public generally, but merely to augment the property rights of a favored few.

Id. at 398.[29]

In contrast the Mahons argued that:

> [T]he protection of the life, health and safety of the public in the anthracite mining communities is the primary purpose of the Act. Its interference with property rights is merely incidental.

Id. at 405.

The majority in *Pennsylvania Coal* rejected the Mahons' contention that the Kohler Act was a legitimate exercise of the police power, and accepted instead the coal company's view. Said Justice Holmes for the Court:

> This is the case of a single private house . . . . A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public . . . . The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is

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[29] The Company urged that the Mahons and other private and public surface owners paid less for their property because they knowingly opted not to buy from the coal company the right to permanent support of the underlying coal. The Kohler Act altered this bargained for contractual relationship of the coal and surface owners. The right to mine the underlying coal was, in effect, transferred by the Act to the surface owner without compensation to the coal owner. Thus, so the argument went, the purchaser of a severed surface estate had purchased land at a reduced cost be-

> owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety.
>
> * * * *
>
> So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

Id. at 413-414, 416.

Thus, while Mr. Justice Brandeis eloquently argued in the oft cited dissent that the Kohler Act was a legitimate exercise of the police power intended to protect public health and welfare, *Id.* at 416-422, it is clear that Pennsylvania Coal was viewed by the majority as a case in which the legislative power was used primarily to protect private parties rather than to enhance public interests.

The case at bar is plainly not one where, as in *Pennsylvania Coal*, the Court is being asked to protect private rights. Rather this case, involving as it does Congress' attempt to regulate a major public problem, fits squarely within that line of precedents where the Court has prohibited the harmful or "noxious" uses of property regardless of whether they produced a "diminution in value." The rule in such cases was long ago defined in *Mugler* v. *Kansas*, 123 U.S. 623, 668-669 (1887):[30]

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a

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cause coal rights were not included. The Kohler Act enabled the surface estate purchaser to obtain much more than he or she bargained and paid for. *Id.* at 416.

[30] Several years after writing *Pennsylvania Coal*, Justice Holmes joined the Court's opinion in *Miller* v. *Schoene*, 276 U.S. 272 (1928), which cites with approval *Mugler* v. *Kansas*.

taking or an appropriation of property for the public benefit.[31]

D. Plaintiffs Have Not Demonstrated A Taking Even Under the Diminution in Value Test

Assuming that the diminution in value test is appropriate in this case, Appellees have not shown that they have been victims of a government taking. Under the established precedent of this Court, a government action does not amount to a taking under the "diminution in value" test unless the owner is left with no reasonable use of his property, so that the property is made valueless. *Agins* v. *City of Tiburon, supra; Andrus* v. *Allard*, 444 U.S. 51 (1979); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915); *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 355 (1908) (Holmes, J.).

Under the diminution in value test the Virginia Appellees must show that their land cannot be used for other non-coal development such as timber cultivation. Both the Virginia and Indiana Appellees must demonstrate that the coal could not be extracted and used by a method that would not violate the provisions of the Surface Mining Act such as in situ combustion of the coal or underground mining. To prevail, the Appellees also must demonstrate that future technological developments will not enable them to extract coal from their property in compliance with the Surface Mining Act. Without such showings, Appellees' property continues to have market value and there can be no taking. No Appellee has made the requisite showing.

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[31] *See also, Goldblatt* v. *Town of Hempstead, supra*; *Miller* v. *Schoene*, 276 U.S. 272 (1928); *Pierce Oil Corp.* v. *City of Hope*, 248 U.S. 498 (1919); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915); *Reinman* v. *City of Little Rock*, 237 U.S. 171 (1915).

CONCLUSION

For the foregoing reasons, Amici submit that the challenged provisions of the Surface Mining Act, as passed by Congress and implemented by the Secretary, are fully consistent with the requirements of the Constitution. Those provisions, moreover, are vital to the preservation of significant social and environmental values. The decisions of the district courts below should be reversed.

Respectfully submitted,

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